Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-5152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR, *Petitioner*,

v.

STATE OF ALABAMA *Respondent*.

On the Writ of Certiorari To
The Supreme Court of Alabama

PETITIONER'S REPLY BRIEF

ROBERT M. BENO,
Counsel of Record
20 Commerce Row
529 South Perry Street
Montgomery, Alabama 36104
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

INDEX

	Page
ARGUMENT:	1
I. Respondent's Statement Of The Case Finds No Support In The Record	1
II. There Was No Probable Cause To Arrest Petitioner And Respondent Has Never Contended To The Contrary	2
III. Respondent's, Analysis Of The Three Factors Set Fourth In *Brown* and *Dunaway* Is Not Supported By Either Of The Decisions	5
A. Neither *Brown* nor *Dunaway* Requires that the Confession Be Caused by the "Shock" Of The Illegal Arrest	6
B. The Intervening Circumstances Relied Upon by the Respondent Are Either Irrelevant to the Issue of Petitioner's Free Will or Actually Detracted from the Petitioner's Exercise of Free Will	7
C. Respondent's Attempt To Distinguish the Flagrant Police Misconduct from the Police Misconduct in *Dunaway* Is Specious	9
IV. The Alleged Good Faith of the Arresting Officers Was Not Developed in the Record, Is Not Properly Before This Court, And, In Any Event, Does Not Limit The Application Of The Exclusionary Rule	10
CONCLUSION:	12

TABLE OF AUTHORITIES

CASES: Page

Aguilar v. *Texas*, 378 U.S. 108 (1964) 4, 11

Brinegar v. *United States*, 338 U.S. 160 (1949) 3

Brown v. *Illinois*, 422 U.S. 590 (1975) 5, 6, 7, 8

Carroll v. *United States*, 267 U.S. 132 (1925) 3

Draper v. *United States*, 358 U.S. 307 (1959) 3, 5

Dunaway v. *New York*, 442 U.S. 200 (1979) ..... *passim*

Henry v. *United States*, 361 U.S. 98 (1959) 3

International Brotherhood of Teamsters v. *Denver Milk Producers*, 334 U.S. 809 (2948) (per curiam) 12

Johnson v. *Louisiana*, 406 U.S. 356 (1972) 7

Jones v. *United States*, 362 U.S. 257 (1969) 5

Spinelli v. *United States*, 393 U.S. 410 (1969) 4, 11

United States v. *Harris*, 403 U.S. 573 (1971) 5

Wong Sun v. *United States*, 371 U.S. 471 (1963) 7

Wood v. *Strickland*, 420 U.S. 308 (1975) 10

PERIODICALS:

Kamisar, *Search and Seizure in America*, 10 Human Rights 14 (1982) 11

ARGUMENT

1. Respondent's Statement Of The Case Finds No Support In The Record

There are three incidents which are of crucial significance to the proper resolution of the issues in this case: (1) the treatment of the informant's tip; (2) the events which occurred at the police station after Petitioner's arrest; and (3) the Petitioner's meeting with his girlfriend. Respondent's Statement of the Case is a selective description of these events and is replete with conclusory statements which are not supported by the record. The record in this case unmistakably demonstrates an arrest without probable cause and a subsequent confession obtained through exploitation of that illegal arrest. Now, approximately four years after the events at issue, Respondent attempts to paint a constitutional gloss on police conduct which clearly fails to measure up to well-established Fourth Amendment standards.

Respondent's factual description of Detective Mobley's handling of the informant's tip simply is not supported by the record. Respondent asserts that Detective Mobley was "unable to verify the information [received from the informant, Charles Martin]." Brief for Respondent at 2. Respondent provides no citation to the record to support this assertion. In fact, the record clearly reveals that Detective Mobley made no attempt whatsoever to verify the tip proved by Martin,[1] in spite of the fact that there was time available to utilize many alternative and constitutional police investigative techniques rather than the illegal arrest of Petitioner.

Respondent also states that after Petitioner was arrested he spent most of the next six hours "in the solitude of his cell." Brief for Respondent at 2. Again, this factual statement has no support in the record. To be sure, the record gives no precise time as to the sequence of events at the police station. However,

---

[1] *See* App. at 8-10.

the record clearly indicates that in the approximately six hours at the police station Petitioner was subject to at least three separate interrogations, a lineup, fingerprinting, and finally met with his emotionally distraught girlfriend after the police had interrogated Petitioner in her presence. This constant shuffling of Petitioner from his cell, clear on the face of the record, hardly squares with Respondent's claim that Petitioner spent most of the six hours "in the solitude of his cell."

Finally, Respondent's description of the meeting between Petitioner and his girlfriend and neighbor only tells part of the story. Respondent asserts that Petitioner and his girlfriend were allowed to meet in private. This, of course, completely ignores Petitioner's uncontroverted testimony that this private meeting occurred only after the police had interrogated Petitioner in his girlfriend's presence and only after the police enlisted his girlfriend to urge Petitioner to confess.

II. There Was No Probable Cause to Arrest Petitioner And Respondent Has Never Contended To The Contrary

Contrary to assertions made at trial, Respondent now contends that the police has probable cause to arrest Petitioner.[2] Respondent points to three pieces of information known to the police at the time of the arrest, which it contends, provides probable cause to arrest Petitioner: (1) the fingerprints found at the grocery store; (2) a description of the suspect; and (3) the tip

---

[2] At trial the prosecution conceded that there was no probable cause but instead argued that the detention for investigation could be based on less than probable cause.

> Mr. Bentley [prosecutor] — Now, it is my position that while the information that . . . Martin gave to Detective Mobley might not amount to probable cause. . . .
>
> . . .
>
> [I]t is not my position that Charles Martin['s tip] gave this Detective information which amounted to probable cause.

App. at 4-5

provided by the informant, Charles Martin. A review of these three grounds demonstrates their inadequacy to support even a colorable claim that probable cause existed to arrest Petitioner.

Respondent fails to explain how the possession of a set of fingerprints, which prior to the arrest had in no way been connected to the Petitioner, could support a finding of probable cause to arrest Petitioner. In relying on the fingerprints, Respondent chooses to ignore the fundamental question in each case involving probable cause — is there a reasonable basis to believe that the particular individual arrested committed the crime? See *Henry* v. *United States*, 361 U.S. 98, 102 (1959); *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949). the unidentified fingerprints in no way provide a link between the robbery and Petitioner and therefore are irrelevant in any determination of probable cause.

Respondent also relies on the fact that the police had a description of the robber as a black male, between twenty and twenty-five years old, about five feet six inches in height, and weighing about one hundred and fifty pounds. This description could not support any claim by Respondent that probable cause existed. The description was so general that it may well have implicated hundreds or even thousands of individuals in the Montgomery area. [3] Moreover, Respondent again ignores the crucial question of whether this information — the description — linked Petitioner to the crime. Respondent provides no citation to the record that indicates that Petitioner matched the description nor any indication that the arresting officers were aware of or relief upon this information when arresting Petitioner. See *Carroll* v. *United States*, 267 U.S. 132, 162 (1925) (facts within knowledge of officer supporting finding of probable cause). Therefore, this Court cannot even determine

[3] *Compare Draper* v. *United States*, 358 U.S. 307, 309 & n. 2 (1959) (description of Defendant included clothing he wore and luggage he carried).

whether the description could have provided any justifiable basis for Petitioner's arrest.

Finally, Respondent relies on the uncorroborated tip provided by the informant, Charles Martin, that ties Petitioner to the robbery. Respondent contends that the tip meets the two-prong test of reliability and credibility articulated by this Court in *Spinelli* v. *United States*, 393 U.S. 410 (1969) and *Aguilar* v. *Texas*, 378 U.S. 108 (1964). A careful examination of the criteria set fourth in these decisions indicates that the tip plainly fails to measure up to the rigid standards set fourth by the Court in these decisions. Indeed, it is precisely the situation presented here — police reliance on an uncorroborated informant's tip — that the Court in *Aguilar* and *Spinelli* condemned.

Respondent argues that Martin was a reliable informant because he "desperately needed help." It is curious that Respondent should rely upon the "desperateness" of an informant to establish that person's reliability, since such "desperateness" is one of the reasons why this Court has erected strict standards for the use of an informant's tip.

Even assuming the reliability of Martin as an informant, *Aguilar* and *Spinelli* also require that the tip be credible. *See Spinelli*, 392 U.S. at 416. In the present case Martin simply asserted that he had "heard" that Petitioner was involved in the robbery. There was no way to judge the credibility of this bald allegation nor did the police make any attempt to determine its credibility. The Police did not even attempt to determine from whom and under what circumstances Martin heard about Petitioner nor why Martin's sources were reliable.[4] Respondent argues that Martin's tip was credible because he was speaking

---

[4] *Compare Spinelli*, 393 U.S. at 416:

> The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source

as a suspect, and therefore a possible participant in the crime. But this justification asserted by Respondent is inconsistent with the information provided by Martin. If Martin's tip was to be believed because he was a participant in the crime, his tip would not have been that he heard from others that Petitioner was involved in the crime but that he saw Petitioner or personally had knowledge that Petitioner was involved in a crime. *See United States* v. *Harris*, 403 U.S. 573 (1971) (informant had personal knowledge of and was personally involved in criminal activity with Defendant). Moreover, a suspect's exculpatory tip which implicated another for the same crime is inherently unbelievable. At a minimum, the police had no obligation to attempt to determine whether there existed a credible basis for the tip by inquiring about the identity and credibility of Martin's source and sources, and the circumstances surrounding Martin's obtaining this information. *Cf. United States* v. *Harris*, 403 U.S. 573 (1971).

Respondent had never before contended that the arresting officers had probable cause to arrest Petitioner. An analysis of the bases for probable cause now proffered by Respondent reveals that Respondent's position is simply an after-the-fact attempt to justify an arrest which even Respondent has virtually admitted failed to meet the Fourth Amendment standard of probable cause.

III. Respondent's Analysis Of The Three Factors Set Forth in *Brown* and *Dunaway* Is Not Supported by Either of the Decisions

Respondent's analysis of *Brown* v. *Illinois*, 422 U.S. 590 (1975) and *Dunaway* v. *New York*, 442 U.S. 200 (1979) ignores the explicit reason stated by this Court for adopting the three-

---

received his information . . . Moreover, if the informer came by the information indirectly, he did not explain why his sources are reliable.

See also Jones v. *United States*, 362 U.S. 257 (1960); *Draper* v. *United States*, 358 U.S. 307 (1959).

factor test — that is, determining the casual relationship between the illegal arrest and subsequent confession and whether the subsequent confession was an exploitation of the illegal arrest and not a result of Petitioner's exercise of free will. *Dunaway*, 442 U.S. at 216; *Brown* 442 at 602. The inadequacy of Respondent's analysis of these three factors is critical for "the burden of showing admissibility rests . . . on the prosecution." *Brown*, 422 U.S. at 604 (footnote omitted). Respondent clearly has not met this burden.

A. Neither *Brown* Nor *Dunaway* Requires That The Confession Be Caused By The "Shock" Of The Illegal Arrest.

Respondent translates the factor of "temporal proximity" into a determination of whether the confession was caused by the "shock" of the Petitioner's illegal arrest. Nothing in the Court's decisions supports this argument. In *Dunaway*, the Defendant was arrested without incident and transported from the police station for questioning and confessed approximately two hours later. The state court had upheld admission of the confession and distinguished *Brown* v. *Illinois* on the basis that the arrest in *Brown* had been marked by force and threats of violence and therefore the confession was not tainted by the illegal arrest. This Court rejected this position, noting that it "betray[ed] a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection', test established in *Brown*." 442 U.S. at 219. [5] Respondent's argument that the confession is tainted only if it was the result of the "shock" of the illegal arrest was raised and expressly rejected in *Dunaway*.

---

[5] To reduce the factor of temporal proximity to a question of whether the confession is caused by the "shock" of the illegal arrest completely ignores the deterrent police which is the core of this Court's decisions in *Brown* and *Dunaway*. In *Brown* and *Dunaway* the Court sought to deter arrests without probable cause. See *Brown*, 422 U.S. at 602-03. Unquestionably, many illegal arrests by the police are similar to the arrest in the present case — the relatively uneventful transporting of the individual to the police station for

B. The Intervening Circumstances Relied Upon by the Respondent Are Either Irrelevant to the Issue of Petitioner's Free Will or Actually Detracted from the Petitioner's Exercise of Free Will

Respondent ignores the explicit statements of this Court that the inquiry in each case must be whether the confession was an exploitation of the illegal arrest or whether it was a result of the exercise of free will. *See Brown*, 422 U.S. at 602; *Wong Sun* v. *United States*, 371 486 (1963). Nowhere dies Respondent attempt to offer to the court any explanation of how these three intervening circumstances — issuance of an arrest warrant, the victim's failure to identify Petitioner, and Petitioner's meeting with his girlfriend — contributed to an exercise of free will by the Petitioner.

Simply stated, the arrest warrant is irrelevant in this inquiry. The issuance of an arrest warrant arguably is relevant to the issue of free will if the Defendant is personally brought before a committing magistrate and informed of his rights. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972); *Brown*, 422 U.S. at 611 (Powell, J., concurring). However, in this case the warrant was not issued after Petitioner had been brought before a committing magistrate and informed of his rights and therefore did nothing to assist Petitioner in the exercise of free will.

Similarly, Respondent leaves the Court to guess how or why the victim's inability to identify Petitioner in a lineup contributed to Petitioner's ability to exercise free will in deciding whether to confess. Nowhere does Respondent provide a citation to the record which indicates that the police even told

---

interrogation — and not marked by threats, force, or violence. In the situation presented in this case, however, the person arrested suffers the same loss of liberty and freedom as does the person arrested by force or violence. And *Dunaway* certainly condemns this species of unconstitutional police conduct as strongly as the illegal arrest effectuated with force or violence.

Petitioner of Mrs. Moseley's inability to identify him.[6] Needless to say, a fact not even made known to Petitioner could hardly have assisted him in considering his situation.[7]

Finally, as noted above, Respondent's reliance on the Petitioner's meeting with his girlfriend flies in the face of the clear and uncontradicted testimony of Petitioner about the content and purpose of the meeting. Respondent provides the Court little explanation of how a police decision to interrogate Petitioner and inform Petitioner of the severity of the penalty and possibly of leniency if he cooperates, all in his girlfriend's presence, contributed to Petitioner's exercise of free will. Also, Respondent fails to detail how Petitioner's girlfriend, who was emotionally upset and crying and used by the police to obtain a confession, could have conversed with Petitioner so as to contribute to Petitioner's ability to carefully objectively consider the alternative options he could exercise. Indeed, as the record makes clear, the purpose and effect of the meeting was to exploit the illegal arrest of Petitioner.

Respondent has chosen to draw the Court's attention to several intervening circumstances. Respondent apparently argues that events intervened between the illegal arrest and confession and therefore the confession is admissible. But surely *Brown* and *Dunaway* command that any analysis of intervening circumstances do not take place without an appreciation of the relationship between the intervening event and the individual's exercise of free will. In the present case

---

[6] Even assuming that Petitioner was aware of this inability to select him from the lineup, the police continued to interrogate Petitioner and continued to treat him as if he were primary suspect in the case.

[7] Also, any determination of whether the police exploited the illegal arrest to obtain a confession cannot be made without considering the effect of the police interrogation which occurred in the presence of the Petitioner's girlfriend. Thus, events occurring prior to this meeting must be evaluated in the context of the officers' other misconduct in exploiting the illegal arrest.

none of these intervening circumstances sufficiently contributed to Petitioner's exercise of free will and therefore did not attenuate the taint of Petitioner's illegal arrest.

C. Respondent's Attempt To Distinguish the Flagrant Police Misconduct from the Police Misconduct in *Dunaway* Is Specious.

Respondent contends that the police misconduct at issue was neither a flagrant violation of Petitioner's constitutional rights nor a purely investigatory arrest. The police misconduct in this case is a virtual replica of *Dunaway* — the police acted solely on the basis of an uncorroborated informant's tip and made an investigatory arrest of Petitioner. Respondent's attempts to distinguish *Dunaway* are, to say the least, specious.

Respondent contends that unlike *Dunaway* other facts were relied upon by the police — the fingerprinting and the description — to justify the arrest. Regardless of the presence of these other alleged pieces of evidence, the fact remains that the arrest was a clear violation of the Fourth Amendment. Also, as noted above, neither of these factors could have provided any basis to link Petitioner to the robbery. Therefore, even assuming any legal validity to such a distinction, it simply is not applicable in this case.

Respondent also attempts to distinguish *Dunaway* on the basis that in the present case the arrest had focused on one individual and there-fore it was not a purely investigative seizure as in *Dunaway*. The record in this case clearly reveals the investigative nature of Petitioner's arrest. As in *Dunaway*, the police decided to check out an uncorroborated tip by an unconstitutional seizure of Petitioner.[8]

---

[8] Respondent offers two other bases for distinguishing the police misconduct in the present case from that in *Dunaway* which hardly merit discussion. First, Respondent argues that unlike *Dunaway*, in the present case the police informed Petitioner that he was under arrest. Respondent fails to articulate why this distinction is legally significant. If anything, this candid admission

IV. The Alleged Good Faith of the Arresting Officers Was Not Developed in The Record, Is Not Properly Before This Court, and, in any Event, Does Not Limit the Application of the Exclusionary Rule.

For the first time in this entire proceeding Respondent raises the argument that because the police officers assertedly acted in a good faith reasonable belief that the arrest was legal the confession should be admissible. In so arguing, Respondent and its police groups amici[9] urge the Court to adopt a "good faith" exception to the Fourth Amendment exclusionary rule.

Any decision by this Court to entertain such an argument, which Petitioner contends should be rejected, should await the case that properly raises that issue and develops evidence relevant to it in the record. No evidence of good faith belief of the police was introduced and no findings of such good faith were made by the trial court. Even assuming the existence of such an exception the police conduct in this case would not be subject to the exception. Under any definition of good faith exception proposed by Respondent, the police conduct at the issue in this case could not be found under applicable standards of law to have occurred in good faith. [10]

---

only highlights the arresting officers' blatant violation of the Fourth Amendment. Second, Respondent argues that unlike *Dunaway*, the arrest in the present case took place during the day. The facts of *Dunaway* state only that the Defendant had been arrested in the "morning." 442 U.S. at 203. Whatever the time of Petitioner's arrest, certainly nothing in the Constitution nor this Court's decisions supports the distinction drawn by Respondent.

[9] Respondent is joined in by amici Americans for Effective Law Enforcement, Inc. and various police groups from the State of Illinois including the Chicago Police Department.

[10] In other areas of the law the Court has stated that a principle of "good faith: must encompass both a subjective and objective component. *See Wood v. Strickland*, 420 U.S. 308, 321-22 (1975). The former test is a determination of what the arresting officers actually believed while the latter requires an inquiry into what a reasonable police officer should have known about the

In this case the constitutional standard governing the conduct of the police was clear. In *Aguilar* and *Spinelli*, decided ten years before the arrest of Petitioner, this Court had clearly condemned the reliance of an uncorroborated informant's tip to establish probable cause. Respondent would have the court believe that the police in this case were faced with an unclear constitutional standard of probable cause governing their conduct and that the police acted in a good faith belief that their conduct measured up to Fourth Amendment standards. [11] In this case, there was nothing unclear, difficult, or perplexing about the constitutional standards governing the police conduct; and if there were any doubts, the police had more than sufficient time to present their evidence to a magistrate. [12]

From a prudential and jurisprudential standpoint this certainly is not the case in which the Court should seek to decide the

---

constitutionality of the conduct at issue. Considering that *Aguilar* and *Spinelli* had clearly spelled out the law in this area the officers' conduct plainly failed to pass the objective test. There is no evidence in the record to support any claim that the officers conduct met the subjective test.

[11] Respondent's discussion on this point is not all anchored to the facts of this case. Respondent and its police groups amici describe generally the dilemma police supposedly face when forced to interpret unclear pronouncements by this Court in spur of the moment situations. This is certainly not such a case — the police waited two weeks before acting on the Respondent which even arguably could have supported the blatantly unconstitutional police misconduct.

[12] As Professor Yale Kamisar has recently noted, police officers who apply in good faith for a warrant but who are denied one for lack of probable cause could hardly proceed to execute the search or arrest. The constitutional standard is probable cause, not good faith belief in probable cause. Although there may be a need to permit some searches or arrests proper to the consideration of probable cause by a neutral and detached magistrate, it makes no constitutional sense to permit the police to make use of evidence, that they would never have had access to had the magistrate's ex parte consideration been interposed when it would have been effective. *See* Kamisar, *Search and Seizure in America*, 10 Human Rights 14 (1982).

important issue of whether a good faith exception should be superimposed upon the long-standing exclusionary rule. There were no findings by the trial court nor any testimony by the arresting officers of the issue of good faith. The absence of a well-developed factual record on the issue of good faith can only impair this Court's reviewing function.[11]

CONCLUSION

The judgement of the Supreme Court of Alabama should be reversed. Respondent has virtually conceded the lack of probable cause to arrest Petitioner and failed to carry its burden of proving that the confession was not tainted by the illegal arrest.

Respectfully submitted

/s/ ROBERT M. BENO
Robert M. Beno
Counsel for Petitioner

---

[11] *See International Bhd. of Teamsters* v. *Denver Milk Producers*, 334 U.S. (1948) (per curiam) (refusal to decide constitutional issue because of inadequacy of the record).